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In the Supreme Court of the United States

OCTOBER TERM, 1963

JOHNNY WALKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	7
Conclusion	10

CITATIONS

Cases:

Burton v. *Driggs*, 20 Wall. 125	8
Colbeck v. *United States*, 10 F. 2d 101	9
Crockmore v. *Crossno*, 259 F. 2d 697	8
Garner v. *United States*, 244 F. 2d 575	9
Holland v. *United States*, 348 U.S. 121	9
Michelson v. *United States*, 335 U.S. 469	9
R. J. Reynolds Tobacco Company v. *Newby*, 153 F. 2d 819	8
Stebbins v. *Duncan*, 108 U.S. 32	8

Statute:

18 U.S.C. 2314	2

Miscellaneous:

3 Wigmore, *Evidence* (3d ed.), § 925, pp. 468-469 (§ 890, p. 380)	9

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1043

JOHNNY WALKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 19-27) is reported at 313 F. 2d 236. The court's opinion denying petition for a rehearing is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1963. A petition for rehearing was denied on March 25, 1963. The petition for a writ of

certiorari was filed on April 24, 1963. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government's rebuttal testimony impeaching the reputation for truth and veracity of petitioner, who testified in his own behalf, was proper.

2. Whether the charge to the jury, to which petitioner did not except, was erroneous.

STATUTE INVOLVED

18 U.S.C. 2314 provides pertinently:

* * * * *

> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited; * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both. * * *

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Southern District of Ohio on four counts of an indictment charging interstate transportation of falsely made securities with fraudulent intent (18 U.S.C. 2314). He was sentenced to five years' imprisonment on each count, to be served concurrently (I R. 6-8, 9).[1] The court of

[1] "I R." refers to appellant's appendix in the court of appeals, "II R." to appellee's appendix.

appeals affirmed. The evidence may be summarized as follows:

1. Four accomplices of petitioner—Morgan Anderson, Carl Sutton, Pat Jackson and Raymond Isaac—testified in behalf of the government. In September 1961, petitioner met Anderson in a Cincinnati night club and discussed passing some checks. Later, petitioner delivered two money orders for $75 each to Anderson with the understanding that the latter would cash them and split the proceeds with petitioner. When this had been accomplished, petitioner gave Anderson and Sutton four additional $75 money orders, which they passed at various places in Kentucky.

The proceeds were divided among petitioner, who received fifty per cent, and Anderson and Sutton, who received twenty-five per cent each (II R. 3-5).

Later, petitioner turned over to Sutton a money order for $125 and an ID card for Maggie Ann Johnson. At petitioner's direction, Sutton communicated with Pat Jackson and had a photograph of her made for the ID card. He then filled out the money order to make it payable to Maggie Ann Johnson and drove Miss Jackson from Newport, Kentucky, to Oxford, Ohio, where, representing herself to be Maggie Ann Johnson, she cashed the money order. The proceeds were afterward divided among petitioner, Miss Jackson and Sutton (II R. 5-9, 13-17).

On another occasion, Sutton and Isaac inserted the name of Leaman Tillman on a check for $450 obtained from petitioner. They then took it from Cincinnati to Newport, Kentucky, where they cashed it,

later delivering the proceeds to petitioner (II R. 9-12, 21-24).

A further transaction involved a check payable to Eugene Nerone in the amount of $400, which Isaac received in Cincinnati from petitioner and, at his direction, passed in Newport. Isaac received $100 for his participation (II R. 17-21).

2. After petitioner had testified on his own behalf, the government called two Cincinnati police officers to testify as to petitioner's reputation for truth and veracity. The following took place in the questioning of Sergeant Denham (I R. 11):

> Q. Would you have occasion to learn anything about his general reputation for truth and veracity?
>
> MR. LONGANO: Objection, your Honor.
>
> THE COURT: That will be sustained, Mr. Morelli. You may ask him if he has the means of knowing.
>
> Q. Do you have the means of knowing what Mr. Walker's general reputation for truth and veracity are?
>
> A. I have.
>
> Q. And what is that general reputation for truth and veracity?
>
> MR. LONGANO: Objection, your Honor.
>
> THE COURT: The objection will be overruled.
>
> A. His reputation for truth and veracity, as far as I have been able to determine from talking to many people—
>
> THE COURT: Sergeant, you weren't asked that. Just a minute. Will you read the question, Mr. Crawford?

THE REPORTER: "And what is that general reputation for truth and veracity?"

A. Bad.

Q. Based on your knowledge of his general reputation for truth and veracity, would you believe the defendant under oath?

MR. LONGANGO: Objection, your Honor.

THE COURT: Overruled.

A. I would not.

MR. LONGANO: Your Honor, I would like to enter an objection to the testimony of the sergeant that was permitted in evidence.

THE COURT: The record may show your objection and it may be considered as a motion to strike. The objection is overruled and the motion denied.

Similar questions were put without objection to the assistant chief of police and similar answers received. At the conclusion of the evidence, petitioner objected and moved to strike but, as before, without articulating his reasons (I R. 13).

3. The court's charge included the following:

> In these United States, ladies and gentlemen, every person is presumed to be innocent until proven guilty beyond a reasonable doubt. I emphasize to you that the returning of an indict- by a grand jury in no way disturbs that presumption.
>
> The grand jury hears only the evidence produced by the prosecution, in this case by the Government, and it does not hear the defendant or any evidence offered by him and he is not there represented by counsel. Further, the finding of the grand jury is only that there is prob-

able cause by reason of which the grand jury feels that the defendant should be brought before you for trial. The grand jury need not find the allegations of the Government beyond a reasonable doubt as is true in this case.

I explain that to you so that you may understand my full meaning when I say to you that the presumption of innocence with which a defendant is clothed, is in no way disturbed by the returning of that indictment. That presumption remains with the person named in the indictment until he is found guilty by the trial jury in the event of such finding.

It will be your duty, ladies and gentlemen, to return a verdict of not guilty on each count of the indictment unless you find that the Government has proved the essential elements of this crime by the requisite degree of proof as to each such count [II R. 24-25]

(T)he law permits introduction of what is called circumstantial evidence. What is meant by circumstantial evidence in criminal cases is the proof of such facts and circumstances connected with or surrounding the commission of the crime charged as tend to show the guilt or innocence of the party charged. If these facts and circumstances are sufficient to satisfy the jury beyond a reasonable doubt, then such evidence is sufficient to authorize the jury in finding a verdict of guilty of the crime or crimes as charged, providing you find by the requisite degree of proof, the existence of all the other facts essential to constitute the crime of which you find defendant guilty by your verdict. Circumstantial evidence is legal and competent evidence in criminal cases

if of such character as to exclude every reasonable hypothesis other than that the defendant is guilty and is entitled to the same weight as direct testimony. [Pet. 12-13]

Let me suggest, that after retiring to the jury room, you refrain from immediately expressing your personal views as to the guilt or innocence of the defendant. Rather, I suggest that after the selection of a foreman, you express your views when requested to do so and express your view as to the guilt or innocence of the defendant only after the foreman has called for a vote on the subject. I make that suggestion because all of us have varying degrees of difficulty in withdrawing from a position prematurely stated and there is always the possibility that an injustice might result from a premature statement on the subject of guilt or innocence. [I R. 15]

Gentlemen, are there any requests?

MR. LUKEN: The Government is satisfied with the charge, your Honor.

MR. LONGANO: Satisfied. For the record, I just want to note my exception. [II R. 25]

ARGUMENT

1. In this Court, petitioner's argument is, essentially, that the rebuttal evidence as to truth and veracity should not have been received because the witnesses were police officers. However, as noted by the court of appeals in denying the petition for rehearing (Pet. App. 28), no objection was made in the district court as to the competency of these witnesses, nor were their qualifications tested either by voir dire or cross examination. Indeed, no reason was assigned at trial

for the bare statement that petitioner objected. The objection is insufficient to preserve anything for review. *Stebbins* v. *Duncan*, 108 U.S. 32, 46; *Burton* v. *Driggs*, 20 Wall. 125. In any event, local police officers are frequently in a position to know the general reputation for veracity of a person in the community and are not infrequently called to testify on such issues in civil as well as criminal cases. See, *e.g.*, *R. J. Reynolds Tobacco Company* v. *Newby*, 153 F. 2d 819, 821 (C.A. 9); *Creekmore* v. *Crossno*, 259 F. 2d 697 (C.A. 10).

Petitioner argues that the form of the question put to the witnesses, whether they had the means of knowing petitioner's general reputation, did not lay a proper foundation for the ensuing question as to what that reputation was. Perhaps the knowledge implicit in the witnesses' answers should have been made express, but this afterthought on petitioner's part does not present a substantial question for review. It is clear from the record that the officers were testifying on the basis of general reputation in the community. The questions addressed to the officers were couched in terms of "general reputation." If petitioner's counsel was not satisfied, he should have cross-examined the officers as to the source of their knowledge.

Petitioner's objection to the oath question is also based on the claim that the police officers were not qualified. Beyond that, as the opinion below discusses, there is considerable disagreement about the propriety of asking veracity witnesses whether they would believe the person involved under oath.

While there are plausible reasons for refusing to allow any personal expression of opinion (see 3 Wigmore, *Evidence* (3d ed.), § 925, pp. 468-469, § 990, p. 380), the rules on the subject are not strictly logical and considerable discretion is allowed the trial courts as to the form of the questions. See *Michelson* v. *United States*, 335 U.S. 469. The conclusion of the court in *Colbeck* v. *United States*, 10 F. 2d 401, 403 (C.A. 7) was that this additional question adds very little to the weight of testimony as to general reputation. In the present circumstances, permitting the question, even if improper, would not warrant reversal.

2. There were no objections at trial to the court's charge and those now urged are without merit. The instruction explaining why the jury should not consider the indictment in arriving at their verdict, although it did not embody the words which petitioner contends should have been said, was more than adequate to express the idea. Cf. *Garner* v. *United States*, 244 F. 2d 575 (C.A. 6), certiorari denied, 355 U.S. 832. The charge also clearly required a finding of guilt beyond a reasonable doubt in order to convict and did so without any indication of what verdict the jury should return. The instruction as to circumstantial evidence was more favorable to petitioner than the law requires. *Holland* v. *United States*, 348 U.S. 121. Finally, it was entirely proper for the court to suggest to the jurors the inadvisability of their prematurely voicing an opinion as to the guilt or innocence of petitioner. The advice given in

no way interfered with a full, frank and orderly exchange of views before a verdict should be reached.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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